

## REMARKS

Claims 1-5 and 19-21 are pending in the present RCE application.

No Claim stands allowed.

The Claims presented herewith comprise only a “clean” set of the Claims wherein underlining, strikethroughs, and related formal editing being omitted. No substantive change has been made in any of the Claims.

Claims 1-5 and 19-51 stand rejected under 35 USC §103(a) as being unpatentable over US 5,875,958 to Weiteder et al. (hereinafter “Weiteder”) in view of US 5,765,747 to Lawson (hereinafter “Lawson”).

Claim 1 is the sole independent Claim pending in the application so that Claims 2-5 and 19-21 are each dependent from Claim 1 either directly or indirectly.

Claim 1 reads as follows:

Claim 1. A fitment for a container having a top end and a first wall associated with the top end and an opening extending through the thickness of the first wall, comprising:

a circumferential flange member adapted to engage the top wall of the container in circumscribing relationship to the opening through the top wall for mounting of the fitment to the container,

a second wall upstanding from said flange member and defining a conduit having an inner wall and entrance and exit ends through which contents of the container may be discharged,

at least said exit end of said conduit having a substantially ellipsoidal planar cross-sectional geometry having at least one major portion and at least one minor portion,

said minor portion being disposed vertically above said major portion when said fitment is affixed to the first wall of the container and the container is oriented in a direction for discharge of the contents of the container through said opening and substantially simultaneous ingress of ambient air into the container through said minor portion of said fitment,

a tear away membrane disposed across said conduit at a location fully within said conduit and spaced apart from said first wall associated with the top end of

the container and having a perimeter releasably joined to said inner wall of said conduit whereby said membrane closes said conduit, and including pull ring means affixed to said tear away membrane thereby providing for localization of an initial tear away force applied through said pull ring.

The Examiner contends that Weiteder et al. “shows all claimed features ... except for the circumferential flange affixed to the inner surface of the top wall and the tear away membrane disposed fully within the fitment conduit.” and that “Lawson shows a pour fitment for a container as seen in Fig. 3, with a flange 28 designed to be affixed to the inner surface of the top wall of a container 10 and the tear away membrane disposed fully within the fitment conduit.”, and concludes the “It would have been obvious to a person with ordinary skill in the art at the time the invention was made to affix the flange of the device of Weiteder to the inner surface of the top wall to provide a more reliable scheme for retaining the pour fitment in place as the container is moved from the inserting station to the sealing station during manufacture and form the tear away membrane fully within the fitment conduit to bring the tear away membrane closer to the user as taught by Lawson.”

At the outset, it is not understood how the Examiner proposes that one skilled in the art could affix the flange of the device of Weiteder to the inner surface of the top wall as proposed by the Examiner. (emphasis added). Notably, the Examiner has not provided an explanation of how such affixation of the flange of the device of Weiteder could take place. First, such action would require abandonment of the Weiteder concept that the end user of the container is to open the container for discharge of its contents by tearing away a portion of the top wall of the container employing an opening aid which is bonded to the to-be-torn away portion of the top wall of the container within the zone of opening area. plus abandonment of the Weiteder concept that the flange of the Weiteder fitment and its upstanding perimetral wall which defines the pouring conduit of Weiteder is to be mounted on the outer surface of the top wall of the container in circumscribing relationship to the zone of opening area of Weiteder and without disruption of the zone of the opening area. For what reason would one skilled in the art desire to make such a drastic change in the Weiteder fitment just to be able to convert the Weiteder fitment to a fitment which could be inserted from a location inside the container into an opening in the top wall of the container and have its flange sealed to the inner surface of the wall of the top end of the container? Certainly no such modification is taught, suggested not disclosed by Lawson, nor does Weiteder or Lawson even address such.

The Examiner states the basis (benefit) for affixing “the flange of the device of Weiteder to the inner surface of the top wall is to provide a more reliable scheme for retaining the pour spout fitment in place as the container is moved from the inserting station to the sealing station during manufacture and form the tear away membrane fully within the fitment conduit to bring the tear away membrane closer to the user as taught by Lawson”. Applicant presumes that this statement is to be interpreted as including BOTH the “manufacturing advantage” AND the forming of the tear away membrane fully within the fitment conduit. The Examiner provides no explanation of why one skilled in the art

would be moved to make such drastic modification of the Weiteder fitment. It thus appears that after having been informed of Applicant's claimed invention, the Examiner has slipped into the hindsight trap of using the Applicant's disclosure as a map to seek out individual elements of Applicant's invention and then combining such elements in a manner which allegedly discloses Applicant's claimed invention.

To combine the integral fitment of Lawson with the Weiteder fitment grossly alters the Weiteder fitment, but in no manner does such proposed combination provide an advantage or improvement of the Weiteder fitment (see discussion hereinbelow). Hence there is no impetus for one skilled in the art to "affix the flange of the device of Weiteder to the inner surface of the top wall..." Even more so, as noted hereinabove, the Examiner's conclusive statement that a person skilled in the art at the time the invention was made "to affix the flange of the device of Weiteder to the inner surface of the top wall" conveys no advantage nor purpose for doing so. For example, how does the proposed affixation of the Weiteder fitment to the inner surface of the top wall of the container differ in advantage or benefit from affixation of the Weiteder fitment to the outer surface of the top wall of the container? If anything, it is more advantageous to affix the fitment to the outer surface of the top wall of the container. (See Cols. 1 and 2 of US 5,304,265, Cols. 1 and 2 of US 5,110,041, Col. 1 and 2 of US 5,200,369 and the references listed).

In this respect, it is noted that in Weiteder, there are multiple components of the fitment.

First, the Weiteder fitment comprises a tearing aid which includes a pull ring and which is bonded to a zone of opening area defined on the outer surface of the container. Obviously such fitment is not intended for insertion in a preformed opening through the thickness of the top wall of the container. Rather, the Weiteder fitment is designed to provide a low profile fitment wherein opening of the container for discharge of the container contents is effected by the user actually tearing a discharge opening through the top wall by means of the low profile opening aid and pull ring.

Provision of an opening through the top wall of Weiteder for insertion of a fitment through such wall as proposed by the Examiner (irrespective of whether the direction of insertion was from the inside or the outside of the container is neither taught, suggested nor disclosed by Lawson, and in fact, incorporation of the Lawson fitment concepts into the Weiteder fitment would render the Weiteder fitment inoperable. In this regard, it is to be noted that the Lawson fitment employs a round (non ellipsoidal) geometry for their discharge conduit. Moreover, the tear away membrane of Lawson is disposed within this round fitment. Thus, if one were to attempt to incorporate the Lawson fitment concepts into the Weiteder fitment, it would be required that either the pouring conduit of the Lawson fitment be geometrically reconfigured to match the ellipsoidal geometry of the Weiteder pouring conduit, or the geometry of the ellipsoidal geometry of the Weiteder pouring conduit would have to be reconfigured to match the round geometry of the Lawson pouring conduit. Reconfiguration of the pouring conduit of Lawson from round to ellipsoidal would be contrary to that feature of the Lawson pouring conduit wherein closure of the Lawson pouring conduit after its initial opening by a user employs

a round screw cap as opposed to a low profile fitment employing a hinged flat cap as required with the Weiteder fitment. In any event, use of a round geometry for the Weiteder fitment mitigates against the pouring advantages recited by Applicant for a fitment pouring conduit of ellipsoidal geometry, such no burping, for example.

Importantly, it is to be noted that if the ellipsoidal geometry of the Weiteder pouring spout were modified to accept a round fitment like Lawson, such action would eliminate from Weiteder all teaching and disclosure of an ellipsoidal geometry for the pouring conduit so that Weiteder no longer could serve as a primary reference under 35 USC 103(a) with respect to the geometrical design of Applicant's pouring conduit as defined in Applicant's Claim 1.

Second, Weiteder discloses a pouring spout which comprises a flange and a "second wall around the circumference of the flange, with the second wall extending outwardly from the flange to define a pouring spout (pouring conduit) of an ellipsoidal geometry. There is no physical connection of either the flange or the second wall, to the opening aid. Lawson teaches and discloses a tear away membrane which is directly bonded to the interior of the Lawson pouring conduit so that one skilled in the art would not look to the Lawson as suggesting a potentially advantageous modification of the Weiteder fitment due to the very large measure of modification of the Weiteder fitment and its ellipsoidal opening of its discharge conduit to a Lawson-like unitary fitment having a round opening in its discharge conduit. More specifically, Lawson teaches away from a two piece fitment such as that employed in the Weitedere fitment.

Third, Weiteder discloses that in the procedure for installation of the Weiteder fitment to the container, the zone of opening area is first defined on the outer surface of the top wall of the container. Next, the opening aid is bonded to the container within such zone of opening area' and then the flange is bonded to the top wall of the container in circumscribing relationship to the zone of opening area. Special care is taken in Weiteder to not allow the flange and its wall to disturb the top wall of the container within the zone of opening area as such would create a leak in the top wall of the container. Lawson teaches and discloses a fitment which requires a preexisting opening through the top wall of a container, a concept which is so alien to Weiteder as to direct one skilled in the art away from some combination of the Weiteder fitment with the Lawson fitment where there is no reasonable and/or advantageous incentive to modify the Weiteder fitment to the extent that it could be inserted and sealed from inside a container into a preexisting opening through the thickness of the top wall of a container.

In view of the foregoing, it is respectfully suggested that the value of Weiteder as a primary reference under 35 US 103(a) teaching a pouring conduit of ellipsoidal planar cross-sectional geometry having at least one major portion and at least one minor portion"...is destroyed if one were to attempt to modify the Weiteder fitment employing the concepts of the Lawson fitment, in the manner suggested by the Examiner for the purpose of being able to insert the Weiteder fitment through an opening in the top wall, from a location inside the container destroys the value of Weiteder as such primary

reference with respect to Applicant's claimed feature of a discharge conduit of ellipsoidal geometry. It is therefore respectfully requested that the rejection of Claim 1 over Weiteder in view of Lawson under 35 USC 103(a) be withdrawn.

Such modification of the Weiteder fitment as proposed by the Examiner requires providing an opening through the top wall of the container with is absolutely the reverse of the original disclosure of Weiteder; it requires that the original two-piece Weiteder fitment be converted to a unitary single piece fitment; it requires different equipment for insertion and sealing of the modified fitment into the newly made opening through the top wall of the container; and a completely different mode of presentation of the modified fitment into the inside of the container as opposed to the presentation to and sealing of the original Weiteder fitment to the outer surface of the top wall. It is respectfully suggested that such change in the mode of affixation of the original Weiteder fitment strongly dictates one skilled in the art at the time of applicant's invention would not be led to make the modifications proposed by the Examiner.

Should it be argued that Lawson discloses the formation of an opening through the thickness of the top wall of the container for the receipt of the modified Weiteder fitment, it must be noted that the Lawson fitment includes a round pouring spout (as opposed to a ellipsoidal pouring spout as claimed by applicant). Thus, following the modification of the Weiteder fitment for insertion into such opening from inside the container as proposed by the Examiner would require one to provide a round opening in the top wall in that sealing a round pouring spout within an ellipsoidal opening obviously is obviously impractical and no one skilled in the art at the time of Applicant's invention would have considered attempting such a combination of openings. Further, such latter action would result in the removal from the disclosure of Weiteder of an ellipsoidal opening, thereby rendering Weiteder no longer a valid reference of a disclosure of an ellipsoidal pouring spout as noted by the Examiner. In this respect, it is also noted that the Lawson fitment discloses a threaded cap for closure of the Lawson fitment after a first opening of the container by a user thereby reenforcing the fact that one skilled in the art at the time of Applicant's invention would be led away from any attempted combination of the concepts of the Lawson with the Weiteder fitment in the manner proposed by the Examiner. In addition, not only does such screw cap indicate the geometry of the Lawson pouring spout to be round, it enforces the fact that one skilled in the art would not look to Lawson and its screw closure cap would contradict the basic purpose of the Weiteder fitment of minimizing the overall height of the fitment through the use of the low profile opening means disclosed by Weiteder.

With respect to the Examiner's contention that it would be obvious to one skilled in the art to utilize the disclosure of Lawson to modify the Weiteder fitment for insertion into a top wall of a container from a location inside the container to provide a more reliable scheme for retaining the pour fitment in place as the container is moved from the inserting station to the sealing station during manufacture and form the tear away membrane fully within the fitment conduit to bring the tear away membrane closer to the user as taught by Lawson.", it is respectfully suggested that no such incentive exists. In

fact, capturing a fitment from a collection of fitments disposed outside a container, and then moving the fitment inside the open end of the container, which is normally oriented upright on a conveyor and moving forward or temporarily stayed, while the fitment is being positioned inside, aligned with a preexisting opening through top wall of the container, followed by sealing of the fitment to the container wall is far more complicated than capturing a fitment from a collection of fitments disposed outside the container and then moving this captured fitment into alignment with a fully exposed opening in the top wall of the container, followed by sealing of the fitment to the outer surface of the container. No support for the Examiner's conclusion that inside insertion is more desirable than outside insertion has been noted.

Still further, the proposal by the Examiner that the Weiteder fitment could be modified to provide Applicant's claimed fitment by incorporating therein those features of Lawson relating to the direction of insertion of the fitment into the top wall of a container and a tear away membrane fully disposed within the pouring conduit of the resulting fitment ignores the fact that such modification of the Weiteder fitment so grossly (1) changes the flat low profile construction of the Weiteder fitment; (2) creates an unresolved conflict between the geometries of the Wieteder and Lawson fitment to the extent of negating the possible use of the modified Witeder fitment as a basis for rejection of Applicant's claimed invention which calls for an ellipsoidal geometry of the pouring conduit of Applicant's invention, or at least results in an inoperable combination of a round pouring conduit disposed within an ellipsoidal opening; and, (3) changes the original Weiteder fitment from a fitment opened by tearing away a portion of the top wall of the fitment to define an opening for discharge of the contents of the container to a fitment wherein the opening of the Weiteder fitment is converted to the use of a tear away membrane separated from the top wall of the container wherein such action is contrary to the desired flat flow profile of the Weiteder fitment; and changes the closure of the pouring conduit after first use by a user from a low profile hinged cap to a screw cap which, in combination with the internal tear away membrane increases the overall height of the resulting fitment thereby negating the low profile desired for the Weiteder fitment.

Thus, one skilled in the art would recognize that to adapt the Lawson fitment for use in the Weiteder container would require costly extensive changes to the Weiteder container and potential operational failures of the modified fitment and/or the fitment installation apparatus. Another added cost aspect resulting from the Examiners proposed modifications of the Weiteder fitment include a new container blank having an opening through the top wall of the Weiteder container. These actions would be recognized by one skilled in the art to contribute significantly to the cost of merely producing the Examiner's proposed Weiteder blank.

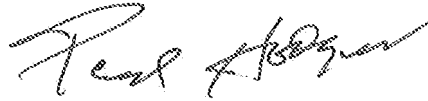
Further, Applicant's attorney has not been able to identify in Lawson any reference to bringing "the tear away membrane closer to the user as taught by Lawson". Clarification is requested. Irrespective, a comparison of Fig. 5 of Weiteder with Fig. 3 of Lawson reveals that the nearness of the removable tamper evident seal of Lawson to the top end of the fitment would not appear to be significantly different from the nearness of that the opening aid of the Weiteder fitment.

Still further there can be no localization of pull by the pull ring in Lawson in that Lawton uses a round geometry of their pouring conduit so that the pull ring exerts the same pull away force to the tear away membrane irrespective of where along the outer perimeter of the membrane the pull ring is located.

Claims 2-5 and 19-21 are dependent, either directly or indirectly, on Claim 1 and therefore inherit each and every limitation of their parent and any intervening claims. Therefore, the allowance of Claims 2-5 and 19-21 is urged for the same reasons, among others, as set forth herein above in discussing the allowance of Claim 1.

Reconsideration of the application and allowance of Claims 1-5 and 19-21 are respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul E. Hodges", with a stylized flourish at the end.

Paul E. Hodges  
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